No. 95-824

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DIANNA DAIR MEYER,

Petitioner,

vs.

SHEARSON LEHMAN BROTHERS, INC., now known as Smith Barney, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the district court's order compelling arbitration (as upheld by the Eleventh Circuit's per curiam decision) denied Ms. Meyer due process of law under the Fifth Amendment to the United States Constitution.

II. Whether the Eleventh Circuit's affirmance of the district court's order compelling Ms. Meyer's ADEA and Title VII claims to binding arbitration conflicts with the decisions of this Court or the Ninth Circuit.

III. Whether the Eleventh Circuit's decision in *Bender* and/or the Federal Arbitration Act undermine Supreme Court precedent or applicable civil rights law.

IV. Whether the district court (as upheld by the Eleventh Circuit's per curiam opinion) properly rejected Ms. Meyer's efforts to vacate the arbitration award.

A. Whether Ms. Meyer failed to establish that the arbitration award was procured by fraud or undue means.

B. Whether the district court correctly held that the arbitrators properly excluded hearsay evidence offered by Ms. Meyer.

PARTIES INVOLVED

The parent company and subsidiaries (excluding wholly-owned subsidiaries) of Smith Barney, Inc. are listed below.*

1. Parent Company:

   The Travelers Group

2. Subsidiaries:

   Institutional Property Owners, Inc. III

   Smith Barney Acquisition Fund, Inc.

   Smith Barney Commercial Corporation Asia Limited

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* Although Lehman Brothers, Inc. is a separate corporate entity, the Company has a financial interest in the outcome of this case. If Smith Barney is found liable, Lehman Brothers will be partially responsible for any liability.

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DIANNA DAIR MEYER,

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vs.

SHEARSON LEHMAN BROTHERS, INC., now known as Smith Barney, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Smith Barney, Inc.[1] respectfully requests that this Court deny Dianna Meyer's petition for writ of certiorari, which seeks review of the Eleventh Circuit's affirmance of two decisions of the United States District Court for the Middle District of Florida. As discussed below, the petition raises no issues worthy of this Court's review.

1. Shearson Lehman Brothers, Inc., the original defendant in this case, now is known as Smith Barney, Inc. For purposes of this brief, Respondent is referred to as Smith Barney, even when the brief discusses events which occurred prior to its name change.

OPINIONS BELOW

This appellate process emanates from two orders issued by the United States District Court for the Middle District of Florida. The first order, entered November 4, 1994 (the "November 4th Order"), is not reported, but is reproduced in Petitioner's Appendix B. The second order, entered November 6, 1994 (the "November 6th Order"), also is not reported, but is reproduced in Petitioner's Appendix C. Because Ms. Meyer's effort to appeal the November 6th Order constitutes, in reality, an appeal of an order compelling arbitration of this case, the United States Magistrate's order compelling arbitration (entered April 23, 1992) and its adoption by the district court on May 13, 1992 are reproduced in Respondent's Appendices A and B.

The Eleventh Circuit Court of Appeals affirmed the November 4th Order and the November 6th Order in a *per curiam* opinion issued on August 29, 1995. The opinion is not reported, but is reproduced in Petitioner's Appendix A.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was based upon 28 U.S.C. § 1331. This Court's potential jurisdiction, however, requires some explanation. First, the district court's November 6th Order denied as moot Smith Barney's motion to modify an inadvertently-issued district court order requesting the parties to submit a standard litigation case management report. Since the November 6th Order is a non-final order, both the Eleventh Circuit and this Court lack jurisdiction under 28 U.S.C. § 1291 to hear that aspect of the appeal. However, giving Petitioner the benefit of the doubt because of her *pro se* status, Ms. Meyer's effort to appeal the November 6th Order appears to be an attempt to appeal a 1992 order compelling arbitration. Although that order also is unappealable due to Ms. Meyer's failure to object to

the underlying Magistrate recommendation, the propriety of the order compelling arbitration is discussed in this brief.

By contrast, the November 4th Order denied Ms. Meyer's request to vacate the binding arbitration award issued in this case. Thus, that order is a final judgment entered by the district court. The Eleventh Circuit therefore had jurisdiction to hear an appeal of that order pursuant to 28 U.S.C. § 1291. Ms. Meyer invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

9 U.S.C. § 10(a)

28 U.S.C. § 1291

The full text of these referenced provisions is located in Appendices C, D, and E.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

Petitioner Dianna Meyer ("Ms. Meyer") alleges that her former employer, Smith Barney, discriminated against her on the basis of age and sex, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). (R. 1-4).[2] Ms. Meyer also alleges retaliation in violation of Title VII and the ADEA. (R. 1-4).

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2. Citations to the Record will be indicated as: R. (volume number) - (document number) - (page number, if applicable).

In May 1989, while employed by Smith Barney, Ms. Meyer filed a charge of discrimination with the Equal Employment Opportunity Commission (the "EEOC"). (R. 1-22, Ex. A-1). Ms. Meyer's initial charge asserted that Smith Barney discriminated against her on the basis of age and gender. (R. 1-22, Ex. A-1). Five months later, after she resigned, Ms. Meyer filed an amended charge asserting retaliation and constructive discharge. (R. 1-22, Ex. A-2). Before the EEOC completed its investigation of either charge, Ms. Meyer obtained a right-to-sue letter. (R. 2-58-2).

Ms. Meyer subsequently filed suit in federal court, based on her charges of discrimination. (R. 2-58-2). Smith Barney denied Ms. Meyer's claims of sex and age discrimination and retaliation, and moved to compel arbitration of the parties' dispute. (R. 1-7; R. 1-21). After the district court granted the motion to compel, Ms. Meyer chose to arbitrate her claims before the New York Stock Exchange. (R. 2-58-2 to 3).

During the course of four days, Ms. Meyer and Smith Barney arbitrated this case. Each party presented considerable evidence in support of their respective positions. (R. 2-58-3). Throughout the arbitration hearings, Ms. Meyer was represented by counsel, James Leone. (R. 2-58-3). After hearing all the evidence, the panel rendered a decision in Smith Barney's favor and dismissed Ms. Meyer's claim. (R. 2-58-3).

On July 19, 1994, Ms. Meyer submitted to the district court (which retained jurisdiction when it compelled arbitration), a lengthy motion to vacate the arbitration award ("First Motion"). (R. 2-53). Smith Barney filed a response to the First Motion, in which it addressed the deficiencies of Ms. Meyer's argument. (R. 2-58). On August 30, 1994, the district court issued an order requiring Ms. Meyer to submit a transcript of the arbitration proceedings. (R. 2-61-2). The court also inadvertently ordered

the parties to file a case management report.[3] (R. 2-61-2). On September 13, 1994, Ms. Meyer submitted a motion to modify the district court's August 30th order ("Meyer's Motion to Modify"), in which she argued that she could not afford the $3,500 cost of the arbitration transcripts. (R. 2-62-2). She then asserted that adequate grounds to vacate had been set forth in her First Motion, and a transcript therefore was unnecessary. (R. 2-62-2 to 3). Smith Barney timely filed a response opposing this second attempt to vacate the award. (R. 3-64). Six days after filing her motion to modify, Ms. Meyer submitted a second (actually it appears to be her third) motion to vacate the arbitration award ("Second Motion"), arguing yet again that the arbitrators' award should be overturned. (R. 3-63). Again, Smith Barney opposed Ms. Meyer's attempt to vacate the arbitration award. (R. 3-65).

On October 14, 1994, Smith Barney filed a motion to modify the district court's order requiring that the parties complete a case management report ("Smith Barney's Motion to Modify"). (R. 3-66). In that motion, Smith Barney noted that the report was unnecessary because this case was a "Track I" case under the local rules of the district court. (R. 3-66-1). Because neither discovery nor a trial is appropriate in Track I cases, the case management report should not have been issued. Ms. Meyer filed a response in opposition to Smith Barney's Motion to Modify. R. 3-70. Ms. Meyer apparently believed that because of the information sought by the case management report, she was entitled to conduct discovery and obtain a trial before the district court, and she apparently perceived that Smith Barney was trying to eliminate those "rights" by its Motion to Modify.

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3. Case management reports are utilized in the United States District Court for the Middle District of Florida to establish discovery and other timetables. They are meant to be issued after the defendant files an answer to a complaint.

On November 4, 1994, the district court issued an extensive order denying Ms. Meyer's attempts to vacate the arbitration award (the "November 4th Order"). (R. 4-71). Two days later, the court issued an additional order stating that Smith Barney's Motion to Modify the case management report was moot given the November 4th Order upholding the arbitration award (the "November 6th Order"). (R. 4-72).

On November 21, 1994, Ms. Meyer filed a request for rehearing ("Request for Rehearing"). (R. 4-73). Before the district court could rule on Ms. Meyer's Request for Rehearing, Ms. Meyer filed notices appealing both the November 4th Order and the November 6th Order. (R. 4-75). On December 9, 1994, the district court issued an order deferring ruling on Ms. Meyer's Motion for Rehearing until the conclusion of Ms. Meyer's appeal. (R. 4-(no document number available)). The Court of Appeals then combined the two appeals. On August 29, 1995, the Eleventh Circuit affirmed the district court's decisions, holding that the court properly compelled arbitration and properly denied Ms. Meyer's request to vacate the arbitration award. Petitioner's Appendix A. On November 15, 1995, the district court denied Ms. Meyer's Motion for Rehearing as moot based on the judgment of the Eleventh Circuit. Petitioner's Supplement to Petition, Appendix A.

B. Statement of Facts.[4]

Ms. Meyer is a former financial consultant (which, in essence, is a stockbroker) at Smith Barney's Winter Park, Florida

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4. Ms. Meyer's Statement of the Case is replete with gross mischaracterization of "facts." Although Ms. Meyer is *pro se*, the procedural history of this case demonstrates that she is familiar with the rules of court. Furthermore, her *pro se* status does not excuse her unjustified personal attacks on the arbitrators, attorneys, and judges in this case. Indeed, her Statement is entirely argumentative, and she *never* cites to the record.

branch office. (R. 1-22-3). Ms. Meyer was employed by Smith Barney (or its predecessor) from January 1987 until she voluntarily resigned her employment on September 22, 1989. (R. 1-22-3). She was hired at the age of 43 by Gerald Helmich, who was then 44. (R. 2-58-2). From the very beginning, Ms. Meyer struggled to produce sales at a desired level, and throughout her employment with Smith Barney, Ms. Meyer consistently was the lowest producer at the Winter Park branch, with the exception of trainees. (R. 2-58-2).

When she became a stockbroker, Ms. Meyer executed a document containing an arbitration agreement. (R. 1-22-4). That document, which is entitled "Uniform Application for Securities Industry Registration," is commonly referred to in the securities industry as a "Form U-4." (R. 1-22-4 to 5). The Form U-4 Ms. Meyer executed obligates her to arbitrate, without limitation, any dispute she may have with Smith Barney or any other member of the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"):

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . .

(R. 1-22-Ex.C, p. 4, ¶5).

As noted above, one such organization with whom Ms. Meyer registered is the NYSE. (R. 1-22-Ex.C, p. 1). The NYSE provides for arbitration of any controversy between a registered representative and any member. (R. 1-22-5). Smith Barney is a member of both the NASD and the NYSE. (R. 1-22-6). Thus, Ms.

Meyer's claims against Smith Barney are covered by the arbitration agreements she executed.[5] (R. 1-22-6).

Following the filing of the complaint and answer in the district court, and in light of the parties' arbitration agreements, Smith Barney sent Nancy Donnellan, Ms. Meyer's counsel, a letter demanding that Ms. Meyer arbitrate all the claims she had lodged against Smith Barney. (R. 1-22-Ex.E). Ms. Meyer's counsel verbally informed Smith Barney's counsel that she would seriously consider arbitration. (R. 1-22-6). When arbitration proceedings were not filed after a reasonable period of time, Smith Barney renewed its demand for arbitration. The latter demand occurred not long after this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), which is discussed in detail below. (R. 1-22-6 to 7). Ms. Meyer's attorney again stated to Smith Barney's counsel that her client was considering arbitration. (R. 1-22-7). Counsel for Smith Barney responded that Smith Barney would wait as long as reasonably possible before filing a motion to compel, but expressed concern over the passage of time. (R. 1-22-7). Finally, when no response was obtained, Smith Barney filed a motion to compel arbitration ("Motion to Compel") on April 8, 1992. (R. 1-21). The next day, Ms. Donnellan filed a motion to withdraw as counsel for Ms. Meyer. (R. 1-25).

A telephonic status conference was held on April 22, 1992. Ms. Meyer attended that conference in person. (Petition, p. 3). On April 23, 1992, Magistrate Baker granted Ms. Donnellan's motion to withdraw. (R. 1-27-1). At the same time, Magistrate Baker granted Smith Barney's Motion to Compel, noting that Ms. Meyer "personally in open Court stipulated that this matter is

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5. The arbitration requirements of the NYSE and the NASD are virtually identical. (R. 1-22-6 n. 2). The rules of both organizations apply to Ms. Meyer and to Smith Barney. (R. 1-22-Ex.C, p. 1). Ms. Meyer could have arbitrated her case under either the NASD or the NYSE. She chose the NYSE.

subject to binding arbitration." (R. 1-27-2). The Magistrate's order explicitly stated that "failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal." (R. 1-27-2). No such objections were filed. Consequently, on May 13, 1992, the United States District Judge issued an order adopting the report and recommendation of Magistrate Baker and staying the action pending the parties' pursuit of relief through binding arbitration. (R. 1-29).

Ms. Meyer and Smith Barney subsequently arbitrated this case. After hearing all the evidence, a panel appointed by the NYSE rendered a decision in Smith Barney's favor. (R. 2-58-3). Ms. Meyer's relentless attempts to vacate that decision are outlined above.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S ORDER COMPELLING ARBITRATION DID NOT DENY MS. MEYER DUE PROCESS OF LAW.[6]

Ms. Meyer contends that the order compelling arbitration denied her "constitutional right to due process as guaranteed by the Fifth Amendment to the Constitution of the United States of

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6. This Court lacks jurisdiction to hear Ms. Meyer's appeal of the district court's non-final order mooting the case management report (the November 6th Order). However, it appears that Ms. Meyer's intent in appealing the non-final order is to challenge the district court's 1992 order compelling arbitration. Although that order also is unappealable due to Ms. Meyer's failure to object to the Magistrate's recommendation, the following section discusses the propriety of the order compelling arbitration.

America." (Petition, p. i). Specifically, Ms. Meyer states that her due process rights were violated because she received inadequate notice of the April 22, 1992 hearing which compelled arbitration. (Petition, pp. 2-4). Ms. Meyer never raised this issue in the district court, but instead asserted it for the first time on appeal before the Eleventh Circuit.

In general, issues briefed on appeal but not raised before the district court cannot be considered by an appellate court. *See, e.g., Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1060 n. 2 (11th Cir. 1994); *Brickner v. Voinovich*, 977 F.2d 235, 238 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2965 (1993). Since Ms. Meyer did not raise her constitutional due process argument in the district court, this argument is improperly asserted on appeal, and should not be resolved by this Court.

Even assuming, however, that this Court seeks to resolve this issue, Ms. Meyer still cannot prevail. As noted above, Ms. Meyer alleges that she was denied due process because she was not given adequate notice of the hearing (held on April 22, 1992) which compelled arbitration. In making this assertion, Ms. Meyer contends that Smith Barney, the district court, and her own attorney all participated in the alleged violation. However, the due process provision of the Fifth Amendment does not apply to private individuals or corporations unless those parties engaged in state action. *See, e.g., National Broadcasting Co., Inc. v. Communications Workers of America, AFL-CIO*, 860 F.2d 1022, 1024 (11th Cir. 1988). Ms. Meyer has not alleged, nor can she prove, that Smith Barney engaged in any type of state action. *See Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251 (11th Cir. 1985) (employer who obtains a court order or judgment is not engaged in state action merely because it uses the legal process). Therefore, Ms. Meyer has not stated a claim against Smith Barney for a constitutional due process violation.

Further, assuming that Ms. Meyer is alleging that the district court violated her due process rights by not providing her with notice of the hearing held on April 22, 1992, that claim is equally without merit. In a civil case such as this, due process requires only that there exist "proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). Ms. Meyer does not have a due process claim in this case because she received adequate notice of the April 22 hearing.

On April 7, 1992, when Ms. Meyer was still represented by counsel, the parties submitted a joint motion to the lower court requesting a status conference. (R. 1-19). In a supporting memorandum, the parties informed the Court that Ms. Meyer had refused to arbitrate and that Smith Barney was filing a motion to compel arbitration. (R. 1-20-1). The parties also noted that Ms. Meyer's attorney, Nancy Donnellan, planned to file a motion to withdraw. (R. 1-20-2). However, at that time, Ms. Donnellan remained Ms. Meyer's attorney of record. (R. 1-20-2).

Smith Barney filed its motion to compel arbitration ("Motion to Compel") on April 8, 1992. (R. 1-21). The next day, Ms. Donnellan filed a motion to withdraw as counsel for Ms. Meyer. (R. 1-25). On April 10, 1992, before the district court ruled on Ms. Donnellan's motion to withdraw, the court issued an order granting the parties' joint motion requesting a status conference, and set the conference for April 22, 1992. (R. 1-24-1). In the order, the court directed Ms. Meyer's counsel "to furnish a copy of this Order to her clients and to advise them of the potential consequences of the contemplated motions so they may take steps to protect their interests and to comply with the obligations of litigants in this Court." (R. 1-24-1 to 2). Copies of this order were mailed to counsel of record. (R. 1-24-2).

A telephonic status conference was held on April 22, 1992. Ms. Meyer and Herman Golnik (her then co-plaintiff) attended that conference in person. (Petition, p. 3). One day later, on April 23, 1992, Magistrate Baker issued an order granting Ms. Donnellan's motion to withdraw. (R. 1-27-1). He also granted Smith Barney's Motion to Compel, noting correctly that Ms. Meyer "personally in open Court stipulated that this matter is subject to binding arbitration." (R. 1-27-2). In his order, the Magistrate explicitly stated that "failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal." (R. 1-27-2). Despite Ms. Meyer's claim that she was "never sent, and never received" a copy of this order (Petition, p. 11), the order clearly indicates that the court sent a copy of the order *directly to Ms. Meyer*. (R. 1-27-2 to 3). On May 13, 1992, the United States District Judge, noting that no objections to the report and recommendation had been filed, issued an order adopting the report and recommendation and staying the action pending the parties' pursuit of relief by binding arbitration. (R. 1-29).

The preceding discussion clearly demonstrates that Ms. Meyer was not denied due process. The district court sent proper notice of the April 22 hearing to counsel of record, and it directed Ms. Meyer's attorney to provide copies of this notice to her clients. Ms. Meyer claims that her attorney did not provide her with notice of the hearing until April 17, 1992, five days before the hearing occurred. Assuming this is true, it simply is irrelevant to this case. The court sent proper notice of the hearing to counsel of record, and that is all that is required under the law.

Ms. Meyer's complaints are properly directed, if anywhere, at the conduct of her former attorney. There exists no contention that the district court did not provide Ms. Meyer's counsel of record with proper notice of the hearing; indeed, Ms. Meyer

candidly admits that all counsel of record received notice of the hearing. (Petition, p. 10). It is clear that Ms. Meyer's counsel not only received notice of the hearing, but she informed Ms. Meyer of the hearing, *which Ms. Meyer attended*. During this hearing, Ms. Meyer stipulated to arbitration in open court. Ms. Meyer then had ten days in which to file objections to the Order. She did not retain a new attorney during these ten days, even though she had opportunity to procure representation; nor did she file objections to the order. The order therefore was binding, and Ms. Meyer was in no way denied due process.[7]

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7. Ms. Meyer cites *Powell v. Alabama*, 287 U.S. 45 (1932), *Geders v. United States*, 425 U.S. 80 (1976), and *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) for the proposition that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. Ms. Meyer certainly was not denied this right. She had at least five calendar days in which to procure counsel before the April 22 hearing, and she had ten additional days to retain counsel before the deadline to submit objections to the Magistrate's report. Further, while she attended the hearing, she did not ask the court at that time to delay its proceedings until she could obtain new counsel.

This case also is distinguishable from *Williams v. Estelle*, 566 F. Supp. 1376 (S.D. Tex. 1983). There, the magistrate relieved the plaintiff's attorney of his duties and replaced him with another attorney who was completely unfamiliar with the plaintiff's case. *Id.* at 1379. The magistrate then provided the new attorney with only two and a half days to prepare for trial. *Id.* Moreover, the magistrate made numerous prejudicial comments in front of the jury during trial. *Id.* at 1378-80. The court therefore held that the magistrate unduly prejudiced the plaintiff's case. *Id.* at 1380.

In this case, the district court properly provided Ms. Meyer's attorney of record with notice of the April 22 hearing, and both Ms. Meyer and her attorney were present at the hearing. Although Ms. Meyer apparently disagrees with her attorney's management of her case, that is immaterial to this appeal. There simply is "no constitutional or statutory right to *effective* assistance of counsel" in civil cases. *Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1522 (11th Cir. 1983) (emphasis added). Thus, Ms. Meyer's allegations regarding the ineffectiveness of her attorney do not establish a due process violation.

Furthermore, assuming for the sake of argument that Ms. Meyer did not receive proper notice of the hearing which compelled arbitration, any due process violation was nonprejudicial because the district court was unquestionably compelled to hold that the arbitration agreement which Ms. Meyer executed is enforceable. As discussed in the following section, the law requiring the arbitration of this case is very clear. There was nothing that Ms. Meyer could have done to change that law regardless of how much notice she had of the hearing. Consequently, even if Ms. Meyer was denied due process, that was harmless error since this case would have been compelled to arbitration anyway.[8]

II.

THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S SUBMISSION OF THIS CASE TO BINDING ARBITRATION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THE NINTH CIRCUIT.

Ms. Meyer asserts that even though the arbitration agreement she signed is enforceable under the Federal Arbitration Act ("FAA"), that enforceability does not extend to claims brought under Title VII. This argument is directly contrary to established Supreme Court precedent and decisions of at least the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

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8. Ms. Meyer argues at length that she was harmed by her alleged failure to receive adequate notice because the district court rendered a decision contrary to her position. (Petition, pp. 7-11). She even goes so far as to allege "complicity" between her former attorney and Smith Barney's attorney. (Petition, p. 8). Ms. Meyer's unjustified attack is inappropriate and unsupported by the record. Moreover, as previously noted, any alleged lack of notice clearly was harmless because the law required the submission of Ms. Meyer's case to arbitration; no amount of additional notice could change the status of the law.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1650 (1991), this Court held that an ADEA claim was subject to compulsory arbitration pursuant to a securities industry arbitration agreement. The plaintiff in *Gilmer* signed the same arbitration clause which Ms. Meyer signed — a Form U-4. *Id.* The Court ruled that statutory claims, including ADEA claims, may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Id.* at 1657.[9]

In this case, Ms. Meyer executed the same arbitration clause as the securities dealer in *Gilmer*. Thus, her ADEA claims are directly controlled by *Gilmer* and are subject to mandatory arbitration. Additionally, while *Gilmer* did not specifically deal with parallel Title VII issues, the Eleventh Circuit unequivocally has held that Title VII claims are subject to compulsory arbitration. *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992). The facts in *Bender* are similar to the facts of this case. The plaintiff, a stockbroker, filed an action under Title VII alleging that she was sexually harassed by her supervisor. *Id.* She also raised pendent state tort claims. *Id.* Like Ms. Meyer, the plaintiff signed a U-4 registration form which included a mandatory arbitration agreement. *Id.* at 700. In her application for registration as a stockbroker with the NASD and the NYSE, the plaintiff agreed to arbitrate disputes with her employer. *Id.* at 699. The Eleventh Circuit held that *Gilmer* was dispositive of agreements to arbitrate Title VII claims. *Id.* at 700. Thus, based on *Gilmer*, the Eleventh Circuit concluded that the plaintiff could not pursue a sexual harassment claim under Title VII except under the NYSE's compulsory arbitration procedure. *Id.*

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9. Ms. Meyer argues that *Gilmer* should not be retroactively applied, and in support of this argument she notes that the Civil Rights Act of 1991 is not retroactive. (Petition, pp. 12-13). However, *Gilmer* did not address new statutory law; rather the Supreme Court interpreted existing law. Thus, the issue of retroactivity is not applicable to the judicial decision rendered in *Gilmer*.

Ms. Meyer cites *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995), in support of her argument that *Bender* conflicts with Ninth Circuit precedent. In *Prudential*, the Ninth Circuit held that there must be a knowing agreement to arbitrate before an employee waives Title VII claims. *Id.* at 1304. Ms. Meyer thus argues that she did not knowingly and voluntarily waive her right to trial on her Title VII claims. In fact, Ms. Meyer states that she was forced to sign the arbitration agreement under "duress." (Petition, p. 14).[10] However, Ms. Meyer is an experienced businessperson, and there exists no suggestion in the record that she was coerced or defrauded into agreeing to an arbitration clause. Thus, the arbitration agreement signed by Ms. Meyer is binding and enforceable, for the reasons set forth by the Supreme Court in *Gilmer*, 111 S. Ct. at 1655-56.

Furthermore, Ms. Meyer's assertion that *Bender* conflicts with Ninth Circuit precedent is patently incorrect. As noted in Respondent's appellate brief and in the *Prudential* decision itself, the Ninth Circuit has expressly held that Title VII claims are subject to compulsory arbitration under the FAA. *See Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). Thus, the Ninth Circuit is in accord with the decisions of the Eleventh Circuit and this Court.[11]

In summary, the facts of this case are substantially similar to

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10. In her Eleventh Circuit brief, Ms. Meyer stated that her signature was not voluntary simply because she was given "ten to fifteen pages of forms" which she did not carefully read before signing. (Appellant's Brief, p. 11).

11. The Fifth, Sixth, and Tenth Circuits also have concluded that Title VII claims are subject to compulsory arbitration under the FAA. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Metz v. Merrill Lynch*, 39 F.3d 1482 (10th Cir. 1994).

Gilmer and *Bender*. Ms. Meyer executed a Form U-4 and contractually agreed to arbitrate any controversy arising out of her employment as a Smith Barney financial consultant. Because Ms. Meyer's ADEA and Title VII claims fall squarely within the contractual language of her agreement, the agreement should be enforced under Supreme Court and Fifth, Sixth, Tenth, Eleventh *and* Ninth Circuit precedent. Thus, the district court correctly submitted this case to binding arbitration.

III.

THE *BENDER* DECISION AND THE FEDERAL ARBITRATION ACT DO NOT UNDERMINE SUPREME COURT PRECEDENT, NOR DO THEY DISTORT CIVIL RIGHTS LAW.

The third issue which Ms. Meyer presents on appeal is vague. However, Ms. Meyer appears to argue that submitting Title VII claims to binding arbitration conflicts with Supreme Court precedent. However, as discussed above, *Gilmer* explicitly held that discrimination claims are subject to compulsory arbitration pursuant to a securities industry arbitration agreement. The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal unanimously agree that *Gilmer* extends to Title VII suits. Thus, despite Ms. Meyer's allegations to the contrary, the *Bender*, *Alford*, *Willis*, *Metz*, and *Mago* decisions, *supra*, are in accord with Supreme Court precedent.

Ms. Meyer also appears to argue that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") conflicts with Supreme Court precedent and distorts civil rights law. Ms. Meyer is correct when she notes that the FAA substantially limits judicial review of arbitration awards. In fact, the FAA "presumes that arbitration awards will be confirmed" and enumerates only four narrow bases for vacatur. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994

F.2d 775, 778-79 (11th Cir. 1993). (*See* Appendix D for the grounds for vacatur). However, this Court has held that the FAA manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). In fact, the primary congressional purpose underlying the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Thus, the Supreme Court has explicitly approved the FAA's policy of favoring the enforcement of arbitration agreements.

IV.

THE DISTRICT COURT PROPERLY REJECTED MS. MEYER'S ATTEMPT TO VACATE THE ARBITRATION AWARD.[12]

A. Ms. Meyer Failed to Establish that the Arbitration Award Was Procured By Fraud or Undue Means.

Ms. Meyer states that the district court erred in not vacating the arbitration award because it allegedly was procured by corruption, fraud, or undue means. This Court recently held that a district court's denial of a request to vacate an arbitration award is subject to *de novo* review. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *see also Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995).

While Ms. Meyer alleges that the arbitration award was procured through undue means and fraud, her assertions are not valid. She initially contends that the arbitration process was

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12. Ms. Meyer's argument regarding vacatur is set forth in her Supplement to Petition for a Writ of Certiorari. Smith Barney once again objects to Ms. Meyer's gross mischaracterization of facts and her failure to cite to the record.

compromised because of alleged misstatements of law and fact by Smith Barney's attorney during his closing argument. Specifically, Ms. Meyer asserts that Smith Barney's counsel misstated the law of sexual harassment, retaliation and the applicable law on damages under Title VII.[13]

Even if Ms. Meyer could prove that Smith Barney's counsel misrepresented a matter to the arbitrators, the arbitration result must be upheld. Ms. Meyer's assumes that a misstatement of law or fact by Smith Barney's counsel (which Smith Barney vigorously disputes occurred) would constitute undue influence. However, assuming that the law and/or facts were misstated, courts may not vacate an arbitration award "on the basis of errors of law or interpretation." *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988).

It also is important to note that Ms. Meyer and her counsel were present at the arbitration hearing and could have responded to the alleged misrepresentations at or near the time that they were made. Indeed, Ms. Meyer admits that her attorney responded to Smith Barney's characterization of sexual harassment and presented a quite different (albeit incorrect) analysis of the law. (R. 4-73-3 to 4). Thus, any alleged "undue influence" was discovered or discoverable during arbitration.

In reality, Ms. Meyer is trying to recharacterize as allegations of undue influence certain issues which she had the opportunity to address during arbitration. Arguably, she is

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13. Smith Barney denies that its counsel misstated the law or facts of this case. A review of the arbitration proceeding would demonstrate that Smith Barney's counsel correctly presented the law of sexual harassment, retaliation and limitations on damages to the arbitrators. However, Ms. Meyer has not presented this Court with a record or transcript from which the Court could possibly analyze or evaluate the arbitration proceedings below.

attempting to retry her case before this Court. That, of course, is inappropriate under the FAA. Further, there exists no actual evidence of undue influence. Consequently, in an effort to discredit Smith Barney, Ms. Meyer argues alternatively that the award should be vacated because one of Smith Barney's exhibits was fraudulent. Specifically, Ms. Meyer accuses Mr. Helmich, her former supervisor, of fabricating a document. That accusation is completely baseless.

Before an award may be vacated for fraud, it must be "abundantly clear" that the award was actually obtained through fraud. *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135, 1137 (M.D. Fla. 1987). To meet this burden of proof, Ms. Meyer must establish: (1) the existence of fraud by clear and convincing evidence; (2) that the fraud was not discoverable upon the exercise of due diligence prior to or during the arbitration; and (3) that the fraud materially related to an issue in the arbitration, thus depriving the party of a fair hearing. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). Ms. Meyer cannot meet any of these requirements.

First, and most importantly, Smith Barney committed no fraud. Mr. Helmich testified on direct examination that Smith Barney's Arbitration Exhibit # 12 was a tracking sheet of new accounts that he used to gauge the initial performance of financial consultants during the training period. (R. 4-76-8). After a few voir dire questions from Ms. Meyer's counsel, this exhibit was admitted into the arbitration proceeding *without objection*. (R. 4-76-8).

Almost eight months after Mr. Helmich's testimony, Ms. Meyer for the first time claimed that Mr. Helmich fabricated the tracking sheet. (R. 4-76-9). She disputes the accuracy of some of the entries, particularly during one week when she allegedly was in Chicago. (R. 4-76-9). Because she states that she was in

Chicago, she leaps to the conclusion that Mr. Helmich fabricated the document. (R. 4-76-9). Clearly, Ms. Meyer's allegation of fabrication of evidence is based solely on speculation.

Further, even if Mr. Helmich had fabricated the document (which Smith Barney adamantly denies), Ms. Meyer could have discovered this "fact" during the arbitration. However, since the document was not included in Smith Barney's list of exhibits supplied before the arbitration, Ms. Meyer argues that there was no way to discover the fraud prior to or during the arbitration. Ms. Meyer fails to mention that there was ample time to discover any alleged fraud during the 18-day period between Mr. Helmich's direct and cross examination.[14] Consequently, Ms. Meyer had more than sufficient opportunity to examine any discrepancies between her alleged tracking sheet and the exhibit in question. It is too late for her to raise that issue now.

Finally, even assuming the document was fraudulent, Ms. Meyer cannot establish that the fraud materially related to an issue in the arbitration, thus depriving her of a fair hearing. Ms. Meyer correctly states that her performance problems were material issues in the arbitration. However, the document in question pertaining to Ms. Meyer's initial sales productivity was only one of many examples of Ms. Meyer's performance problems. Moreover, Ms. Meyer has *never* disputed that she barely met the initial quota of opening 40 qualified accounts within six months, which is what the document in question was introduced to demonstrate. (Both sides agree that she only opened 41 accounts within that deadline). The tracking sheet in question therefore was not pivotal in this case, and Ms. Meyer

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14. Mr. Helmich's direct examination occurred on March 31, 1994. (R. 4-76-8 n. 7). Due to the unexpected length of Ms. Meyer's case, the arbitration had to be continued, and another session was scheduled for April 19, 1994. (R. 4-76-8 to 9 n. 7). Mr. Helmich's cross examination did not begin until that day and lasted for several hours. (R. 4-76-8 to 9 n. 7).

was afforded ample opportunity to cross examine Mr. Helmich on the issue to which it relates. *See O.R. Securities*, 857 F.2d at 749 (award not vacated when falsity of testimony was or should have been noticed during the arbitration proceedings and movant had the opportunity to crossexamine regarding the alleged false testimony); *Peabody*, 677 F. Supp. at 1137-38 (award not vacated where plaintiff's expert witness perjured his credentials; the issue to which the expert testified was "relatively minor" and defendants were able to cross examine the witness and present countervailing testimony if desired). As a result, Ms. Meyer's allegations of fraud do not provide grounds to vacate the award.

B. The District Court Correctly Held that the Arbitrators Properly Excluded Hearsay Evidence Offered by Ms. Meyer.

Ms. Meyer also objects to the arbitrators' exclusion of a three-ring notebook entitled "The Arrogance of Power: How Shearson's Uncontrolled, Arbitrary Power Led to the Wrongful Treatment of this Broker." (Supplement to Petition, pp. 7-9). The notebook consisted of Plaintiff's descriptive analysis (essentially written hearsay testimony) of the facts of her case, numerous newspaper and magazine articles, and various other inadmissible materials. (R. 2-58-3 n. 2). The arbitrators agreed that the notebook was irrelevant and inadmissible. (R. 2-58-3 n. 2).

The district court correctly held that the exclusion of the book does not mandate vacatur of the arbitration award. The arbitrators are the judges of the admissibility and relevancy of evidence. *Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985). Absent "exceptional circumstances," a reviewing court may not overturn an arbitration award based on the arbitrator's determination of the relevancy or persuasiveness of evidence. *Id.* at 39-40. In fact, vacatur of an arbitrator's award for refusing to hear evidence is appropriate *only* when the exclusion

of *relevant* evidence so affects the rights of a party that it deprives him or her of a fair hearing. *Id.* at 40. As noted above, Ms. Meyer's notebook was not only irrelevant, it did, in fact, consist of hearsay evidence. Thus, the arbitrators properly excluded the notebook from evidence.

CONCLUSION

The Eleventh Circuit's affirmance of the district court's November 4th Order and November 6th Order is not in conflict with that of other Circuits, nor do the issues at hand involve important questions of federal law that should be settled by this Court. While Ms. Meyer may be unrelenting in her efforts to state a case against Smith Barney, those efforts arise more from antagonism than from merit. The law is well-settled that this case should have been arbitrated. Further, that arbitration was fair in both process and result.

There exists no reason for this Court to second-guess either the propriety of the decision to arbitrate this case or the result that was reached in the arbitration. Consequently, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED APRIL 23, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 91-193-Civ-Orl-19

DIANNA D. MEYER, LINDA C. FRANK and HERMAN K. GOLNIK,

Plaintiffs,

-vs-

SHEARSON LEHMAN BROTHERS, INC.,

Defendant.

ORDER AND REPORT AND RECOMMENDATION

This cause came on for consideration with oral argument heard on April 22, 1992 on the following motions filed herein:

MOTION: **MOTION TO WITHDRAW AS COUNSEL FOR PLAINTIFFS DIANNA D. MEYER AND HERMAN K. GOLNIK, JR. AND FOR ENLARGEMENT OF TIME TO SUBMIT PRE-TRIAL STIPULATION (#25)**

FILED: April 10, 1992

Thereon it is **ORDERED** that the motion is **GRANTED.** Ms. Donnellan is relieved of further responsibility for

representation of Plaintiffs Dianna D. Meyer and Herman K. Golnik, Jr., both of whom will be proceeding *pro se*.

MOTION: DEFENDANT'S MOTION TO COMPEL ARBITRATION (#21)

FILED: April 9, 1992

Plaintiff Linda C. Frank, by counsel, and the other two Plaintiffs personally in open Court stipulated that this matter is subject to binding arbitration pursuant to agreements signed by the Plaintiffs. The United States Supreme Court has held that statutory claims such as these are subject to arbitration clauses. *Gilmer v. First Interstate/Johnson*, 111 S.Ct. 1647(1991).

Accordingly, the undersigned respectfully recommends that the motion be granted and that this case be stayed pending the parties' pursuit of relief by binding arbitration in accordance with their agreement.

As to the recommendation set forth above, failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

DONE and **ORDERED** in Orlando, Florida, this 23rd day of April, 1992.

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Appendix A

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Herman K. Golnik, Jr.
109 Oak Lane
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APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED MAY 13, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE NO. 91-193-CIV-ORL-19

DIANA D. MEYER, et al.,

Plaintiffs,

v.

SHEARSON LEHMAN BROTHERS, INC. f/k/a Shearson Lehman Button, Inc.,

Defendant.

ORDER

This matter came before the Court on the Report and Recommendation of the United States Magistrate Judge (Doc. No. 27, filed April 23, 1992). No objections to the Report and Recommendation of the Magistrate Judge have been filed within the ten days from such Order.

Upon consideration, the Report and Recommendation of the Magistrate Judge is **ADOPTED**, and the cause is **STAYED** pending the parties' pursuit of relief by binding arbitration in according with their Arbitration Agreement.

The Plaintiff shall file a status report with this Court within ninety (90) days from the date of this Order, and every

ninety (90) days thereafter, advising the Court of the status of the arbitration proceedings and what, if any, further proceedings are necessary in this Court.

DONE AND ORDERED at Orlando, Florida this ___ day of May, 1992.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

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Appendix B

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APPENDIX C — U.S. CONST. AMEND. V

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D — 9 U.S.C. § 10(a)

9 U.S.C. § 10(a)

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

APPENDIX E — 28 U.S.C. § 1291

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.